

TO: Frank DeLuise
Designated Federal Officer
Natural Resource Damage Assessment and Restoration Advisory Committee

FROM: Q3 Subcommittee: Alex Beehler, John Carlucci, Pat Casano, Barry Hartman,
Nancy King, Jon Mueller, Stephen Polasky

Re: Proposed Scope, Resource Needs, and Time-line for Addressing Question 3

The subcommittee has been asked to provide an analysis -- for consideration by the whole Committee -- on the following questions:

*Should DOI revise the CERCLA NRD Regulations to encourage compensating for interim losses with additional restoration projects in lieu of monetary damages?
If so, how should project-based interim loss compensation claims be calculated?*

This memo puts forth our subcommittee's proposal for the preliminary scope of this analysis -- including both primary and secondary issues that should be considered. It also includes the subcommittee's recommendation for additional support and resources that will be helpful for the analysis, and a suggested time-line for presentation of the analysis and any associated recommendations, to the full Committee.

We have approached this question assuming that its context is, 1) a desire to harmonize, where appropriate, the approach to interim losses in the CERCLA and OPA NRD Regulations to avoid confusion; 2) clarify the identification and measurement of losses in the CERCLA NRD Regulations in order to avoid confusion and unnecessary contention, and 3) provide flexibility for utilizing cost-effective alternatives to compensate for natural resource losses in order to encourage negotiated settlements.

SCOPE – PART I

Should DOI revise the CERCLA NRD Regulations to permit flexibility to allow for compensating for interim losses with additional restoration projects in lieu of monetary damages?

Primary Issues:

- What advantage is gained by the identification and “scaling” of projects to quantify interim loss of resource services, rather than simply monetizing the economic value of the interim lost services? Alternately, what disadvantage is there to project-based interim loss calculation? Can the cost implications of the respective approaches be identified? Are there associated technical restrictions?
- If the CERCLA NRD Regulations are revised to permit project-based scaling for interim losses, is it helpful to include a hierarchy of project-based interim loss scaling (resource to resource, service to service, value to value, etc.) as provided

in the OPA NRD Regulations?

- If the CERCLA NRD Regulations are revised, to permit project-based scaling for interim losses, should they explicitly provide for opting out of project-based scaling, and utilizing the dollar value of the lost services (i.e., the current CERCLA Reg. valuation) as the measure of damages, as the OPA NRD Regulations provide? Should criteria for opting out be specified, or should there be maximum flexibility?

Secondary Issues:

- Should interim losses in the CERCLA NRD Regulations remain explicitly discretionary, or should they be treated as part of a unitary claim, as in the OPA NRD Regulations?
- Can the CERCLA NRD Regulation provide any useful guidance on the relationship between the measure of damages specified in the regulations and the measure of interim loss damages in settlement and/or cooperative assessment contexts?
- Is it appropriate to have consistent nomenclature and definitions of categories of restoration and damages (e.g., baseline vs. primary restoration, compensable value vs. compensatory restoration, etc.) in the CERCLA and OPA NRD Regulations?

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SCOPE – PART II

If so, how should project-based interim loss compensation claims be calculated?

Primary Issues:

- Should the CERCLA NRD Regulations specify suggested categories of interim losses for calculation?
- Should interim loss claims value only lost services to humans, as the CERCLA NRD Regulation currently provides, or should it also calculate the value of interim ecological service (or “environment”) losses, without a requirement for a specific showing of a public nexus, as the OPA NRD rule provides.
- How reliable are available methodologies for valuing habitat or ecosystem service losses? Should the CERCLA NRD Regulations specifically identify certain methodologies (such as Habitat or Resource Equivalency Analysis, Conjoint Analysis, etc.) as “best available procedures” for calculating interim loss

damages? More generally, should the regulation specify criteria for evaluating methodologies to allow for the development of new assessment tools?

- Is it appropriate to scale the value of interim loss projects that provide for additional natural resource services to the public (such as boat ramps or hiking trails) but do not directly restore, replace, or rehabilitate natural resources? Does CERCLA permit this type of compensation for interim losses?

Secondary Issues:

- What is the appropriate point in time for the initiation of interim loss calculations – From the date of the enactment of CERCLA? From the date of the release, if later, until restoration or replacement? From the date Trustees notify PRPs of their intent to undertake and assessment, etc.? Should the rule discuss flexible approaches to setting this time period?
- How specific and/or feasible do project-based interim losses need to be. Are abstract units of habitat, such as “acre-years” sufficient, or should projects for scaling employ specific or generic project descriptions.
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SUPPORT AND RESOURCES RECOMMENDATION

- Our analysis should include a “side by side” comparison of the CERCLA and OPA NRD regulations’ treatment of interim losses. This analysis should also consider the respective statutory provisions and restrictions that govern the respective regulations.
- The subcommittee expects to seek specific examples of interim loss decisions made pursuant to the respective regulations (or otherwise.) How did utilization of the regulations affect the resolution/outcomes of these cases? The subcommittee does not intend this review as a forum for critiquing settled cases, but rather as a means by which specific provisions of the current regulations can be identified that (a) impaired an outcome that the parties preferred, or (b) was instrumental in achieving an outcome that the parties deemed appropriate. The subcommittee expects to rely on discussions with actual case participants in order to inform this analysis. The subcommittee hopes to establish a public, transparent means by which these examples can be communicated, perhaps through a web-based “open forum”.
- The subcommittee expects to rely on professional resource economists for a survey of interim loss calculation methodologies. This survey will also include information on cost implications, and technical feasibility, if available.

- The subcommittee will also rely on other experts – including economists, ecologists, attorneys, practitioners, and participants in the formulation and discussions of the respective NRD Regulations on an “as-needed” basis in order to fully inform our analysis.
- The subcommittee will need to have resources and a facility available for at least one two-day meeting before providing an analysis to the full committee.
- Open Access for input.

SUGGESTED TIME-LINE

- Preliminarily (depending on the issue-scope approved by the full Committee), the subcommittee anticipates being able to provide a full report by August 01, 2006. We recommend that the analysis be circulated to the full Committee and to the public at that time. We will then be prepared to lead a discussion on the issue at a full Committee meeting that should take place no sooner than 30-days later, to allow for full consideration of the analysis by both the Committee members and the interested public before deliberations begin.